MALACCA SECURITIES SDN BHD

v.

LOKE YU

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[CIVIL SUIT NO: 22-54-97]
[1998] CLJ JT(8)
12 JUNE 1998

CIVIL PROCEDURE: *Jurisdiction - High Court in Malaya - Territorial jurisdiction of a branch High Court - Power to transfer proceedings - Whether a branch High Court could transfer proceedings pending before it to another branch High Court - Doctrine of forum conveniens - Applicability - Whether a branch High Court could decline to exercise jurisdiction to hear suit by virtue of doctrine of forum conveniens - Federal Constitution, art. 121 - Courts of Judicature Act 1964, ss. 3, 23(1)(a) & (b) - Schedule to Courts of Judicature Act 1964, para 12 & proviso thereto*

STATUTORY INTERPRETATION: *Courts of Judicature Act 1964 - Paragraph 12 of Schedule thereto - Proviso to para 12 thereof - Word "court" in phrase "power to transfer any proceeding to any other court" in para 12 - Whether referring only to High Court in Malaya and High Court in Sabah and Sarawak - Whether extending to the branch High Courts - Provisos in legislation - Proper functions of - Courts of Judicature Act 1964, para 12 of Schedule thereto*

The plaintiff is a licensed stockbroker with its registered address at No. 171, Jalan Bunga Raya, Melaka. The defendant, who worked in Petaling Jaya and lived at No. 23, Persiaran Syed Putra, Kuala Lumpur, operated an account with the plaintiff and used its services for transacting in shares. The plaintiff claimed that the defendant had owed it a sum of RM3,509,323.29 under the said account, and in the circumstances filed a suit against the latter in the High Court in Malaya at Melaka claiming the sum so allegedly owed.

The defendant denied the claim and filed a counterclaim against a third party. Pending hearing of the suit, however, the defendant applied under s. 23(1)(a) and (b) of the Courts of Judicature Act 1964 ('the CJA') to have the suit transferred to the High Court in Malaya at Kuala Lumpur, on the ground that the latter court was the more appropriate forum to hear and preside over the suit. The plaintiff sought to oppose the application, and argued in its opposing affidavit that the High Court in Malaya at Melaka ought to be the most

appropriate forum to hear the suit, as the transactions were carried out in Melaka, the cause of action arose in Melaka and the witnesses were also mostly from Melaka. Before the learned judge, the primary questions that arose were: (i) whether bearing in mind the scope and purport *inter alia* of ss. 3 and 23(1) CJA, as well as para 12 of the Schedule to the CJA, including the proviso thereto, a branch High Court has power to transfer a proceeding pending before it to another branch High Court; and (ii) whether the High Court in Malaya at Melaka herein, in any case, could decline to exercise the jurisdiction to hear the suit in question on the ground that the suit, by virtue of the doctrine of *forum conveniens*, should be heard in another branch High Court.

Held:

[1] The civil jurisdiction of the two High Courts in Malaysia is governed by s. 23(1) of the CJA. This section, read with s. 3 of the CJA, sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Sabah and Sarawak.

[2] A plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state. This court therefore has jurisdiction to entertain the present action even if the defendant is correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also. However, the fact that the court has jurisdiction to hear the dispute is not the end of the matter. The critical issue for determination is whether this court is the *forum conveniens* to hear the dispute notwithstanding the fact that it has jurisdiction to do so.

[3] For all practical purposes the branch High Courts can be considered as having their own jurisdiction. It would therefore be oppressive and vexatious to commence proceedings in a particular branch of the High Court in Malaya when it could have been more suitably or appropriately commenced in another branch as it would defeat the very object for which the branch High Courts were set up. It would amount to a defendant being improperly vexed by legal procedure if a plaintiff is to be allowed to choose a branch High Court of his choice by virtue of the local jurisdiction of the High Court in Malaya. It is part of the general jurisdiction of the court to prevent such abuse. The corollary is that an action should be filed and heard in the proper branch of the High Court in Malaya.

[3a] It follows that a branch High Court can decline to exercise its jurisdiction even when the other forum is another branch court. In declining to exercise jurisdiction, however, a court does so not on grounds of convenience but of the suitability or appropriateness of another tribunal in the interests of all parties and for the ends of justice. It would constitute very strong grounds for the court to decline to exercise its jurisdiction to hear the case in cases where an action is filed in the wrong branch of the High Court.

[3b] As to the conditions to be met in choosing the correct branch of the High Court, proof of the provisions of s. 23(1) CJA will meet the requirement of the conditions laid down in *St Pierre v. South American Stores (Gath & Chaves) Ltd.*

[4] The word 'any' in the phrase "power to transfer any proceding to **any** other court…" in para 12 of the Schedule to the CJA is clear indication that the word 'court' therein goes beyond the High Court in Malaya and the High Court in Sabah and Sarawak. If the intention of the legislature was to confine the operation of para 12 to just the two High Courts then it would have used the word "the" instead of "any" as in s. 23(1) of the CJA. Hence, the word 'court' in the said para 12 must extend to and include as well the branch High Courts.

[4a] Paragraph 12 also makes it clear that the power given to transfer proceedings is only from a High Court "to" any other High Court and not "from" any other High Court to itself. A High Court is therefore only empowered to transfer an action pending before it "to" any other High Court and not "from" any other High Court unto itself.

[5] The power conferred by the enacting part of para 12 relates not only to the power to exercise the jurisdiction to transfer a proceeding to another High Court, but also to the power to execute any order made. However, the proviso to the paragraph provides that the power conferred shall be exercised in such manner as may be prescribed by rules of court.

[5a] When there is a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. It follows that the proviso to para 12 refers to matters that are within the scope of the paragraph. What requires consideration is the precise nature of the power that the proviso has excepted from the paragraph.

[6] As the jurisdiction of the High Court is unlimited it cannot be capable of being prescribed. The rules contemplated by the proviso to para 12 cannot therefore apply to the jurisdiction of the court to entertain a transfer application. Accordingly, the proviso must refer only to the power which is concerned with the manner of execution of an order for transfer that has been made. This would relate to the manner of performing and carrying out the order made. This is clear from the language of the proviso as it refers only to the manner of exercising the power and not to the jurisdiction to exercise the power itself.

[7] No rules as stipulated by the proviso to para 12 have so far been made. In the absence of such rules, the exercise of the power conferred by the paragraph would depend on whether the rules constitute a condition precedent to the exercise of such power.

[7a] It is clear that, bearing in mind the legislative intent with which the rules were required to be framed, the rules as contemplated by the proviso constitute a condition precedent to the exercise of the power conferred by para 12. That being so, in the absence of any rules having been made, the power conferred by the paragraph cannot be exercised.

[7b] It ought also to be noted that the rules as required by the proviso to para 12 do not relate to the hearing of the application for transfer itself, but to the manner of execution of the order made following the hearing process. That being the case, the question of the principles of natural justice taking the place of the required rules does not arise, and the court, therefore, is all the same disabled from exercising the power conferred by para 12.

[8] The defendant herein had conducted his share transactions in Melaka. The amount due on the account is therefore payable in Melaka. In the circumstances, the breach in payment of the sum due must have occurred in Melaka. The plaintiff's cause of action therefore arose in Melaka. The plaintiff's case also comes within sub-para (c) of s. 23(1) as the facts on which the action is based occurred in Melaka. As the plaintiff has brought itself within s. 23(1)(a) & (c) of the CJA it is entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur.

Obiter dictum

[1] The fact that the power conferred by para 12 cannot be exercised does not mean that a party who wishes to have a case transferred from one branch of the High Court to another branch is without remedy. He may obtain the desired result in accordance with s. 20 of the CJA, by which the Chief Judge may direct that a particular case shall be heard by a particular High Court judge.

[Application dismissed.]

Cases referred to:

Arunima Das v. Secretary, Board of Secondary Education AIR [1957] Cal 182 ***(refd)***
Bank Bumiputra Malaysia Bhd v. Melewar Holdings Sdn Bhd & 4 Ors [1990] 1 CLJ 1246 ***(refd)***
Chua Toh Hua & Anor v. Lee Cheng Giam & Anor [1949] MLJ 33 ***(refd)***
Cuban Atlantic Sugar Sales Corp v. Compania De Vapores San Elefterio Limitada [1960] 1 All ER 141 ***(refd)***
Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262 ***(refd)***
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 ***(refd)***
Humphreys v. Edwards [1875] 1 Char Pr Cas 81 ***(refd)***
Hyman v. Helm [1883] 24 Ch D 531 ***(cit)***
Jackson v. Spittall [1870] 5 LRCP 542 ***(refd)***
Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 ***(refd)***
Lam Kok Trading Co (Pte) Ltd v. Yorkshire Switchgear & Engineering Co Ltd [1979] 1 MLJ 239 ***(foll)***
Lee Lee Cheng (f) v. Seow Peng Kwang [1960] MLJ 1 ***(cit)***
Logan v. Bank of Scotland (No 2) [1906] 1 KB 141 ***(cit)***
Loke Wan Tho v. Lachie Mc Donald & Ors [1949] MLJ 293
Madras & Southern Maharatta Rly Co Ltd v. Bezwada Municipality AIR [1944] PC 71 ***(refd)***
Mc Henry v. Lewis [1882] 22 Ch D 397 ***(cit)***
Megayacht Sdn Bhd v. Hong Leong-Lurseen Shipyard (1992) Sdn Bhd [1997] 2 CLJ Supp 48 ***(refd)***
Mullins v. Treasurer of Survey [1880] 5 QBD 170 ***(refd)***
Narendra Nath Nandi v. Amiya Chowdry 63 CWN 216 ***(refd)***
Northey Stone Co v. Gidney [1894] 1 QB 99 ***(refd)***
Peruvian Guano Co v. Bockwoldt [1883] 23 Ch D 225 ***(cit)***
Pramatha Nath v. State of West Bengal 70 CWN 503 ***(cit)***
PP v. Oie Hee Koi [1968] 1 MLJ 148 ***(refd)***
PP v. Seeralan [1985] 1 CLJ 524 ***(dist)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***
Re Application of Asia Insurance Co Ltd [1968] 2 MLJ 228 ***(refd)***
Re Sterling ex p Esanda Ltd [1980] 30 ALR 77 ***(refd)***
Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58 ***(cit)***

Sim v. Robinow [1892] 19 R 665 ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(foll)***
Spiliada Maritime Corp v. Consulex Ltd [1987] 1 AC 460 ***(refd)***
St Pierre v. South American Stores (Gath & Chaves) Ltd [1936] 1 KB 382 ***(foll)***
Surinder Singh v. Central Government & Ors AIR [1986] SC 2166 ***(foll)***
Sykt Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Co Sdn Bhd [1975] 2 MLJ 115 ***(refd)***
Tan Choon Chye v. Singapore Society of Accountants [1979] 2 MLJ 61 ***(refd)***
Thangaman v. Chief Secretary, Madras AIR [1965] Mad 225 ***(refd)***
The Atlantic Star [1973] 2 All ER 175 ***(refd)***
Thornton v. Thornton 11 PD 176 ***(cit)***
Tung Lian Enterprise v. Poly Trading Co [1993] 4 CLJ 189 ***(refd)***
Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, para 12, ss. 3, 20, 23(1)(a), (b), (c), (d)
Federal Constitution, art. 121
Rules of the High Court 1980, O. 12 r. 4, O. 15 r. 3
Supreme Court Act 1981 [UK], s. 65

Other source referred to:
Black's Law Dictionary, 6th edn

For the plaintiff - CK Lim (Sekar Palaniandy with him); M/s Shareena Abdullah & Lim
For the defendant - CY Choong (SS Tieh with him); M/s Paul Ong & Assoc
For the counter-claimant - LK Tiu; M/s Koh Kim Leng & Co

Reported by WA Shariff

JUDGMENT

Augustine Paul J:

The plaintiff is a licensed stockbroker with its registered address at No 171, Jalan Bunga Raya, 75100 Melaka. The defendant, whose last known address was at No 23, Persiaran Syed Putra, 50460 Kuala Lumpur, operated an account with the plaintiff and used its services for transacting in shares. The plaintiff's action against the defendant, filed in the High Court in Malaya at Melaka, is for the sum of RM3,509,323.29 and interest due on his account arising from share transactions. The defendant denied the claim and contended that the amount due arose as a result of collusion between the plaintiff and one Lim Teck Meng who had used his account for the purchase of shares thereby incurring the debt. The defendant brought a counterclaim against Lim Teck Meng pursuant to O. 15 r. 3 of the Rules of the High Court 1980.

On 26 January 1998 the defendant filed an application to have this action transferred to the High Court in Malaya at Kuala Lumpur based on s. 23(1)(a) and (b) of the Courts of Judicature Act 1964 ("the CJA"). In his affidavit in support of the application he affirmed that his address is in Kuala Lumpur and that he works in Petaling Jaya, Selangor. Thus, he said, the trial of the action in Melaka would inconvenience him and cause him a greater expenditure as he and his witnesses are from Kuala Lumpur. In opposing the application the plaintiff affirmed in its affidavit-in-reply that the defendant used its services to carry out his share transactions in Melaka and that the cause of action arose in Melaka. The plaintiff further said that as its witnesses would be from Melaka the appropriate forum to hear the action ought to be the High Court in Malaya at Melaka. The application was heard on 20 April 1998. Learned counsel for the defendant repeated what had been affirmed in the affidavit by the defendant. He also said that the cause of action arose in Kuala Lumpur. As such, he contended, this action should be heard in the High Court in Malaya at Kuala Lumpur in accordance with s. 23(1) of the CJA. In support of his argument he referred to cases such as *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1; [1996] 2 MLJ 413; *Dayasar Corp Sdn Bhd v. C P Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 1 MLJ 191; *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268; *Tung Lian Enterprise v. Poly Trading Company* [1993] 4 CLJ 189 and *Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365. In his reply learned Counsel for the plaintiff contended that the cause of action arose in Melaka and, accordingly, the High Court in Malaya at Melaka is the appropriate forum to hear this action. In support of his argument he referred to *Bank Bumiputra Malaysia Bhd v. Melewar Holdings Sdn Bhd & 4 Ors* [1990] 1 CLJ 1246 and *Megayacht Sdn Bhd v. Hong Leong-Lurseen Shipyard* (1992) Sdn Bhd [1997] 2 CLJ Supp 48.

It is my view that cases relating to transfer of proceedings in the subordinate courts, relied on by both counsel, are not relevant to their submissions on the law relating to a similar issue in the High Court. Before I proceed any further it is first necessary to consider the scope of the power of a High Court to transfer a proceeding pending before it to another High Court. The starting point is Art. 121 of the Federal Constitution which reads as follows:

There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(i) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(ii) one in the States of Sabah and Sarawak which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine.

The civil jurisdiction of the two High Courts is governed by s. 23(1) of the CJA which reads as follows:

> Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated,
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> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

The phrase "local jurisdiction" is defined in s. 3 of the CJA as

> (a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Trengganu and the Federal Territory of Kuala Lumpur; and
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> (b) in the case of the High Court in Sabah and Sarawak the territory comprised in the States of Sabah and Sarawak, and the Federal Territory of Labuan including, in either case, the territorial waters and the air space above those States and the territorial waters.

It follows that s. 23(1) of the CJA read with the definition of "local jurisdiction" in s. 3 of the CJA sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Sabah and Sarawak respectively (see *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Co Sdn Bhd* [1975] 2 MLJ 115). The effect of the provisions of law that I have referred to were neatly summarised by Gopal Sri Ram JCA in *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1 at p. 7; [1996] 2 MLJ 413 at p. 419 in the following terse terms:

> First, it is crystal clear from art. 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

Although it is clear that there are only two High Courts in Malaysia there are several branch High Courts in the different states of the country. The establishment of the branch High Courts is contemplated by art. 121 of the Federal Constitution itself by its reference to the "principal registry" which implies the existence of subsidiary or branch registries. On the status of these branch High Courts reference may be made to *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 where Lim Beng Choon J said at p. 270:

> It is implicit that a High Court located at Penang or at Alor Star is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

In referring to this case Edgar Joseph Jr J (as he then was) said in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ at p. 180; [1989] 3 MLJ 509 at p. 512:

> The case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state.

The result is that a plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state (see *Re Application of Asia Insurance Co Ltd* [1968] 2 MLJ 228). I therefore hold that this Court has jurisdiction to entertain this action even if the defendant is correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also. But, as Lim Beng Choon J observed in *Sova Sdn Bhd*, that is not the end of the matter as the critical issue for determination is whether this court is the *forum conveniens* to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so. His Lordship added at p. 271:

> However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:
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> (i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from

the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the inconvenience caused may outweigh the amount of costs awarded to him;

(ii) the obvious reason for the setting up of a branch of the High Court in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.

For the reasons as stated above, I do not think that the present civil proceedings should be dealt with by this court. I am also of the view that it is for the defendants to apply to this court for a transfer of the civil suit and the application made by the plaintiff under O. 81(1) to the High Court in Malaya at Penang or Kuala Lumpur since the cause of action arose in Penang but the parties have their places of business in Kuala Lumpur.

His Lordship therefore declined to exercise his jurisdiction to hear the case on the ground that it should be heard in another branch High Court in accordance with the doctrine of *forum conveniens*.

That brings into focus the circumstances in which a court which has jurisdiction to hear a case can lawfully decline to exercise its jurisdiction on the ground that the case must be heard by a more accessible court. In declining to exercise jurisdiction a court does so not on grounds of convenience but of the suitability or appropriateness of another tribunal in the interests of all the parties and for the ends of justice (see *Sim v. Robinow* [1892] 19 R 665, *Spiliada Maritime Corp v. Consulex Ltd* [1987] 1 AC 460). In this regard reference may be made to *The Atlantic Star* [1973] 2 All ER 175 where Lord Morris of Borth-y-Gest said at pp. 183-184:

The cases show that if there is jurisdiction in the court and if a plaintiff becomes entitled to invoke it and chooses to do so he may nevertheless in some circumstances not be allowed to do so. In the decisions which indicate what those circumstances are certain words constantly emerge. They are such words as 'vexation' or 'oppression'. Thus in *Mc Henry v. Lewis* [1882] 22 Ch D 397 Sir George Jessel MR said that it was part of the general jurisdiction of the court to prevent a defendant being 'improperly vexed' by legal procedure …. .

In *St Pierre v. South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 Scott LJ, in accordance with the principles laid down in cases such as *Mc Henry v. Lewis* [1882] 22 Ch D 397; *Peruvian Guano Co v. Bockwoldt* [1883] 23 Ch D 225; *Hyman v. Helm* [1883] 24 Ch D 531; *Thornton v. Thornton* 11 PD 176 and *Logan v. Bank of Scotland (No 2)* [1906] 1 KB 141, laid down

the conditions that must be satisfied in declining jurisdiction to hear a case which is otherwise properly brought on the ground that it must be heard in another court. They are:

(a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and

(b) the stay must not cause an injustice to the plaintiff.

It must be noted that these conditions were laid down in the context of staying proceedings in the court of one country when it should have been brought in the court of another country. It was on the basis of two separate jurisdictions that the court applied these conditions in *Chua Toh Hua & Anor v. Lee Cheng Giam & Anor* [1949] MLJ 33. This case, on the other hand, is concerned with two courts having the same jurisdiction and yet having their own distinct jurisdiction as reflected by the judgment in *Sova Sdn Bhd* and by O. 12 r. 4 of the Rules of the High Court 1980 which speaks of the local jurisdiction of each High Court in Malaya. The rule reads as follows:

> References in these rules to the time limited for appearing are references:
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> (a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time as so extended; and
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> (b) in the case of a writ served within Sarawak or Sabah, to 10 days after service of the writ (including the day of service) or in the case of a defendant whose place of residence or if an incorporated society whose registered office or business is not within the Division or Residency in which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);
>
> (c) in the case of a notice of a writ served out of the jurisdiction, to the time limited under O. 10 r. 2(2), or O. 11 r. 4(3), or, where that time has been extended as aforesaid, to that time as so extended.

It must be remembered that the Rules of the High Court 1980 were made under the authority of the CJA thus giving tacit approval to this jurisdiction of the branch High Courts. For all practical purposes the branch High Courts can thus be considered as having their own jurisdiction. In my opinion it would therefore be oppressive and vexatious to commence proceedings in a branch of the High Court in Malaya when it could have been more suitably or

appropriately commenced in another branch as it would defeat the very object for which the branch High Courts were set up. This would amount to a defendant being improperly vexed by legal procedure if a plaintiff is to be allowed to choose a branch High Court of his choice by virtue of the local jurisdiction of the High Court in Malaya. As Scott LJ said in *The Atlantic Star* it is part of the general jurisdiction of the court to prevent such abuse. The corollary is that an action should be filed and heard in the proper branch of the High Court in Malaya. Thus as illustrated by *Sova Sdn Bhd* a branch High Court can decline to exercise its jurisdiction even when the other forum is another branch court. However, where a person is properly served within the jurisdiction for a matter over which the court has jurisdiction a stay can be granted only on very strong grounds (see *Loke Wan Tho v. Lachie Mc Donald & Ors* [1949] MLJ 293). Where a case is filed in the wrong branch of the High Court then it would constitute very strong grounds for the court to decline to exercise its jurisdiction to hear the case in the light of the reasons that I have discussed. With regard to the conditions to be satisfied in choosing the correct branch of the High Court it is my view that proof of the provisions of s. 23(1) of the CJA will meet the requirement of the conditions laid down in *St Pierre*. Thus s. 23(1) of the CJA, enacted to determine the territorial jurisdiction of the two High Courts in Malaysia, should serve as the basis for the jurisdiction of the branch High Courts.

It is now appropriate to consider the power of a branch High Court to transfer a proceeding pending before it to another branch High Court. This is governed by para. 12 of the schedule to CJA ("para. 12"). It is in the following terms:

> Power to transfer any proceedings to any other court or to or from any Subordinate Court, and in the case of transfer to or from a Subordinate Court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of Court.

Three issues arise for observation in the interpretation of para. 12.

The first is whether the word "court" in the phrase "Power to transfer any proceeding to any other *court* ..." (emphasis added) in para. 12 is confined in its meaning to the High Court in Malaya and the High Court in Sabah and Sarawak bearing in mind the definition of the word "court" in s. 3 of the CJA as "the High Court" and the phrase "the High Court" as "the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require" or whether it extends to the branch High Courts. In my opinion the use of the word "any" in the phrase "Power to transfer any

proceeding to *any* other court ..." (emphasis added) is clear indication that the word "court" goes beyond the two High Courts. If the intention of the legislature was to confine the operation of para. 12 to just the two High Courts then it would have used the word "the" instead of "any" as in s. 23(1) of the CJA. It must be noted that a definition provided for a word or phrase by s. 3 of the CJA does not apply if the context in which it is used otherwise requires. Thus the context of para. 12 requires the word "court" to be given a meaning other than that provided in the definition section of the CJA to include branch High Courts.

The second is that the power given to transfer any proceeding is only from a High Court "to" any other High Court and not "from" any other High Court to itself. This is made manifestly patent by the use of the word "to" in the phrase "Power to transfer any proceedings *to* any other court ..." (emphasis added) in para. 12. That the power to transfer proceedings is restricted as I have described finds further support in the language employed in para. 12 itself in the case of transfer of proceedings in the Subordinate Courts which is widely worded to authorise transfer "… to or from any Subordinate Court ...". It is therefore clear that a High Court is only empowered to transfer an action pending before it "to" any other High Court and not "from" any other High Court to itself. Consequently an order made by a High Court transferring a case to itself from another High Court would be without jurisdiction and, accordingly, *ultras vires* the explicit words of para. 12.

The final matter for consideration relates to the exercise of the power itself that has been conferred by para. 12 to transfer a proceeding to any other court in the light of the proviso to it. A power which a court of law has includes not only jurisdiction to entertain a suit but also execution of any decree passed therein (see *Pramatha Nath v. State of West Bengal* 70 CWN 503). In *Re Sterling Ex parte Esanda Ltd* [1980] 30 ALR 77 it was held that if a power is conferred upon a body by a statute there is implied as a concomitant of that power, the power to perform it. Thus the power conferred by the enacting part of para. 12 relates not only to the power to exercise the jurisdiction to transfer a proceeding to another High Court but also to the power to execute or carry out any order made. However, the proviso to the paragraph provides that the power conferred shall be exercised in such manner as may be prescribed by rules of court. It must be noted that a proviso is not a substantive provision (see *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147; [1997] 1 MLJ 145). The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case (see *Madras & Southern Maharatta Rly Co Ltd v. Bezwada Municipality* AIR 1944 PC 71).

When there is a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso (see *Mullins v. Treasurer of Survey* [1880] 5 QBD 170. It follows that the proviso to para. 12 refers to matters that are within the scope of the paragraph. What now requires consideration is the precise nature of the power that the proviso has excepted from the paragraph. As the jurisdiction of the High Court is unlimited (see *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58; [1997] 2 MLJ 105) it cannot be capable of being prescribed (see *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] MLJ 1). The rules contemplated by the proviso to para. 12 cannot therefore apply to the jurisdiction of the court to entertain a transfer application. Accordingly the proviso must refer only to the power which is concerned with the manner of execution of an order for transfer that has been made. This would relate to the manner of performing and carrying out the order made. This is clear from the language of the proviso itself as it refers only to the manner of exercising the power and not to the jurisdiction to exercise the power itself.

The addition of the proviso to the paragraph reflects the wisdom of the legislature. This is because any order made for the transfer of a proceeding by a High Court to another High Court would in fact be a direction that the case be heard by another court of co-ordinate jurisdiction. This must be further read against the background of s. 20 of the CJA which provides that the distribution of business among the judges of the High Court is at the direction of the Chief Judge. The complexity of the transfer of a proceeding from a High Court to another High Court of co-ordinate jurisdiction can be seen in the old English case of *Humphreys v. Edwards* [1875] 1 Char Pr Cas 81 where it was held that an order for the transfer of a cause from one division of the High Court to another is not effectual until the sanction has been obtained of the President of the Division to which it is proposed to transfer the cause. Thus the need for rules to be made to regulate matters relating to the execution or the carrying out of an order for transfer made by a High Court to another High Court requires no emphasis. In England s. 65 of the Supreme Court Act 1981 governs the power to transfer a proceeding from one division of the High Court to another while O. 4 of the Rules of the Supreme Court prescribes the manner of exercising the power.

Up to now no rules have been made as stipulated by the proviso to para. 12. That raises the question of whether the power that has been conferred by the paragraph to transfer a proceeding can be exercised even though no rules have been made as required by its proviso. In *Surinder Singh v. Central Government & Ors* AIR [1986] SC 2166 it was held that if the formulation of rules is a condition precedent to the exercise of a power given by a statute then in the

absence of any such rules the power cannot be exercised. Singh J in writing for the court in that case said at p. 2169:

> Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of Rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression 'subject to the rules' only means, in accordance with the rules, if any. If rules are framed, the powers so confirmed on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.

And at p. 2170:

> If the legislative intent was that until and unless rules were framed power conferred on the authority under ss. 8, 16 and 20 could not be exercised, that intent could have been made clear by using the expression 'except in accordance with the rules framed' a displaced person shall not be paid compensation by sale of pool property. In the absence of any such provision the framing of rules could not be a condition precedent for the exercise of power.

It follows that in the absence of any rules having been made as required by the proviso to para. 12 the exercise of the power conferred by the paragraph would depend on whether the rules constitute a condition precedent to the exercise of such power. This in turn would depend on the legislative intent with which the rules were required to be framed. The intention of the legislature can be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it one way or the other (see *Arunima Das v. Secretary, Board of Secondary Education* AIR [1957] Cal 182; *Thangaman v. Chief Secretary, Madras* AIR [1965] Mad 225). It is the duty of the court to fathom the real intention of the legislature by carefully attending to the whole scope of the enactment (see *Narendra Nath Nandi v. Amiya Chowdry* 63 CWN 216). It has been held that enactments regulating the procedure to be followed in Courts are usually imperative and not merely directory (see *PP v. Oie Hee Koi* [1968] 1 MLJ 148). As I said earlier the legislature has excepted the manner of execution of an order that has been made from the enacting part of para. 12. As this power has been taken out from the enacting part of the paragraph it is not exercisable unless rules are made as stipulated in the proviso. The result is that the enacting part of the paragraph is only left with the power to order a transfer with no power to perform or carry out the order

so made. An order made without power to enforce it will be ineffectual. This is particularly significant as the proviso is designed to regulate the procedure to be followed when an order is made for the transfer of a case from a High Court to another court of co-ordinate jurisdiction. It is therefore my view that the exercise of the power conferred by para. 12 depends on the existence of rules contemplated by its proviso as any order made without any rules to that effect would be ineffectual as it cannot be carried out. The language employed in the proviso also supports this conclusion. The use of the word "shall" in the proviso gives it a mandatory effect. The use of the word "provided" to introduce the proviso is also significant. As *Black's Law Dictionary* 6th Edn. says this word ordinarily "… signifies or expresses a condition." In the premises it is my view that the rules contemplated by the proviso constitute a condition precedent to the exercise of the power conferred by para. 12. Thus in the absence of any rules having been made the power conferred by the paragraph cannot be exercised.

It is also necessary to consider the case of *PP v. Seeralan* [1985] 1 CLJ 524; [1985] 2 MLJ 30 which dealt with a similar issue where rules had not been made as required. In that case Salleh Abas LP in writing for the Federal Court said at p. 30:

> The magistrate's power under para. 26 of the Third Schedule of the Subordinate Courts Act to take cognizance of any contempt of court and to award punishment for the same is exercisable to "such extent and in such manner as may be prescribed by rules of court". Order XXXVIII r. 1 of the Subordinate Courts Rules 1950 made provisions for the exercise of this power and Abdoolcader J (as he then was) held in *Re Kumaraendran (supra)* that the rule applied to a contempt of court committed in the face of the court in respect of proceedings of a civil nature as well as or at best by analogy to those of a criminal nature because the rule is "a statutory crystallisation of an established principle of law". However, when the Subordinate Courts Rules 1980 came into effect replacing the 1950 Rules, the provisions of Order XXXVIII r. 1 of the 1950 Rules were not retained. There is, therefore, no provision in the present Subordinate Courts Rules regarding the exercise of this power by the magistrate either in respect of civil proceedings or criminal proceedings. In our view the absence of such provision in the rules of court does not mean that the power cannot be exercised. The magistrate can effectively exercise the power so long as the contemnor is given an opportunity of being heard. For this purpose we refer to the principle enunciated by Sir Jocelyn Simon P. in *Qureshi v. Qureshi* [1971] 2 WLR 518 where he said:
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> > ... where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance

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> with natural justice and to promote the objective with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies.

In this context the guideline provided for by Ali J (as he then was) in *Public Prosecutor v. Lee Ah Keh & Ors* [1968] 1 MLJ 22 still stands.

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The reference to the application of the rules of natural justice as a substitute for the required rules means that the principle in *Seeralan* is relevant only when the rules govern the hearing process. To my mind this is logical as rules required to be made to regulate the hearing process would themselves be based on the rules of natural justice. The absence of any such rules can therefore

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be readily and validly met by an application of the rules of natural justice. Thus in *Tan Choon Chye v. Singapore Society of Accountants* [1979] 2 MLJ 61 it was held that the absence of any rules to regulate the manner of holding an inquiry did not preclude an inquiry being held if it is conducted in accordance with the rules of natural justice. As the rules required by the

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proviso to para. 12 do not relate to the hearing of the application for transfer itself but to the manner of execution of the order made following the hearing process the question of the principles of natural justice taking the place of the required rules does not arise. Even if it can be argued that the rules contemplated by the proviso to para. 12 can be substituted with comparable

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legislation then the legislation must be one that relates to the execution of an order made by a High Court which affects another court of co-ordinate jurisdiction. There is no such comparable legislation at the moment. In the premises the principle enunciated in *Seeralan* is inapplicable to this case and the High Court is disabled from exercising the power conferred by para. 12

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on that reasoning.

The fact that the power conferred by para. 12 cannot be exercised does not mean that a party who wishes to have a case transferred from one branch of the High Court to another branch is without any remedy. He may obtain the desired result in accordance with s. 20 of the CJA which reads as follows:

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> The distribution of business among the judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

The word "distribution" is defined in *Black's Law Dictionary* 6th Edn as:

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> The giving out or division among a number, sharing or parcelling out, allotting, dispensing, apportioning.

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Thus the section deals with the allotment or dispensing of work among the judges of the High Court in accordance with directions given by the Chief Judge. The nature of this function is clearly administrative in nature. It must be observed that the exercise of this power by the Chief Judge also includes a direction which can be given with respect to a single case. This flows from the use of the words "... a particular nature … " in the section which means that the Chief Judge may direct that a particular case shall be heard by a particular High Court Judge. It would also include the sending of a case file pending before a judge of the High Court to another judge of the High Court at a different branch. A party who desires to have a case pending in a particular High Court to be heard by another High Court may therefore apply to the Chief Judge for directions to that effect. Needless to say there can be no appeal against any direction given by the Chief Judge.

What I have said thusfar would arise for consideration in this case only if, in the first place, the plaintiff's case has been filed in the wrong branch of the High Court contrary to the provisions of s. 23(1) of the CJA. The principal contention of the defendant is that this action should be tried in the High Court in Malaya at Kuala Lumpur in accordance with s. 23(1) of the CJA as he resides there. It thus becomes necessary to consider the legal effect of the section. It has four sub-paragraphs. The comma appearing at the end of sub-paras. (a), (b), (c) and (d) in the section followed by the word "or" means that they must be construed disjunctively. Thus a party instituting a proceeding in a particular branch of the High Court may do so if his case falls within any one of the sub-paragraphs. That was the basis on which Abdul Hamid J (as he then was) determined the jurisdiction of the court in *Lam Kok Trading Co (Pte) Ltd v. Yorkshire Switchgear & Engineering Co Ltd* [1979] 1 MLJ 239.

In this case sub-paras. (b) and (d) clearly cannot apply in favour of the plaintiff as the defendant resides in Kuala Lumpur and the subject matter of this action is not land. That leaves for consideration sub-paras. (a) and (c) of the section. I shall first consider sub-para. (a). With regard to accrual of a cause of action in contract cases it is deemed to have occurred at the place where the breach took place. In support of this principle I refer to the case of *Cuban Atlantic Sugar Sales Corporation v. Compania De Vapores San Elefterio Limitada* [1960] 1 All ER 141 where Lord Hodson LJ said at p. 143:

> ... The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been committed in the United Kingdom.

And Omrod LJ said in the same case at p. 145:

> ... Counsel for the defendants at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under RSC Ordinance 11 r. 1 should be administered with the greatest care, as it is a rule which tends to encroach on the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction.

In a contract for the payment of money the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of "cause of action" is the act on the part of the defendant which gives the plaintiff his cause of complaint (see *Jackson v. Spittall* [1870] 5 LRCP 542). The failure to pay will be the cause of complaint. That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place (see *Bank Bumiputra Malaysia Berhad v. Melewar Holdings Sdn Bhd & 4 Ors* [1990] 1 CLJ 1246). Where there is no agreement as to the place where the payment should be made then the payment should be made at the place where the plaintiff lives. In this regard I refer to *Northey Stone Company v. Gidney* [1894] 1 QB 99 where Charles J said at p. 100:

> The action is brought to recover the balance of the price of goods sold and delivered. According to the law applicable to contracts, there being no special stipulation as to the place of payment, the defendant must pay at Bath, where his creditors, the plaintiffs, live.

In this case the plaintiff's registered address is in Melaka. The defendant opened an account with the plaintiff in Melaka. The defendant conducted his share transactions in Melaka. The amount due on the account is therefore payable in Melaka. If there is to be any dispute on this issue it is resolved by the fact that the plaintiff's registered office is in Melaka thereby making Melaka the venue for payment of the sum due. In the circumstances the breach in payment of the sum due occurred in Melaka. The plaintiff's cause of action therefore arose in Melaka. The plaintiff's case also comes within sub-para. (c) as the facts on which the action is based occurred in Melaka. I pause to add that the defendant's denial of liability is a matter for resolution at the trial and does not alter the conclusion that I have drawn. As the plaintiff has brought itself within s. 23(1)(a) and (c) of the CJA it is entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur. The defendant's application is therefore without any merit.

In the result I dismissed the application with costs. This appeal is against that order.